IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
February 26, 2008 Session

STATE OF TENNESSEE v. JAMES HAROLD NELSON

Direct Appeal from the Circuit Court for Sevier County
No. 11615 Rex H. Ogle, Judge

No. E2007-01648-CCA-R3-CD - Filed March 28, 2008

The Petitioner pled guilty to rape of a child, leaving the length of the sentence to be determined by the trial court. Following a sentencing hearing, the court enhanced the Petitioner's sentence to twenty-five years based on a previous criminal conviction, previous criminal conduct, and abuse of a position of trust. The Petitioner appeals that decision, claiming the trial court should have mitigated his sentence because he pled guilty and allowed the victim and her family to avoid re-living the incident at trial. After a thorough review of the record and applicable law, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JERRY L. SMITH and ALAN E. GLENN, JJ., joined.

Ronald C. Newcomb, Knoxville, Tennessee, for the Appellant, James Harold Nelson.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Leslie E. Price, Assistant Attorney General; James Dunn, District Attorney General; Steven R. Hawkins, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION
I. Facts

At the plea hearing, the State explained the basis for the plea as follows:

> If your Honor please, if we had gone to trial the facts of this case would show that [M.P.K.[1]], in April of 2004, was noticed to be sexually acting out. She was

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[1]As is this Court's custom, we will refer to the minor victim by initials only.

questioned about that. Who may have touched you or why do you keep playing with yourself like that? She was just four years old. She said Papa would come in her room at night and touch her, touch her down there, and as the questioning continued, have her touch his penis. They tried to go into more specifics with her but she wouldn't really give them more specifics with regard to that. She is the great-niece, as I understand it, of this defendant, and for a time was living with his family.

Also complaining was another child, four or five years old, which was his granddaughter, which there wasn't enough evidence about that. But she complained basically of the same thing. They shared a bedroom.

This little girl, [M.P.K.], said that she was told by Papa, you're not to say anything to anybody about what happened.

DCS interviewed her and contacted the Sevier County Sheriff's Department. Detective Mike Watson was assigned to it.

He talked to [M.P.K.], who is here, Angela Kennedy, the child's mother, and talked to Mr. Nelson. Mr. Nelson completely denied it and said he didn't know why the child was saying that, that he didn't touch that child like that, he didn't do anything such as that.

The bed clothes, the sheets, and I believe panties, also, were gathered up and turned over to Detective Watson. Detective Watson said would your DNA be on any of this, and this defendant absolutely denied it, said there would be no reason for it to be on there. He couldn't think of any reason and that absolutely nothing like that had happened. He denied all the allegations.

The sheets were sent to the crime lab and they reported back about a year later that they had located semen, once they got to it. They had located semen on the victim's bedsheet and pillowcase, in several different spots.

On July 28th of 2005, Detective Watson re-interviewed the defendant. Again, he denied it, but at that time, he interviewed this defendant's son, Eric Nelson, who stated that, you know, in December, looking back I walked into that bedroom, this is the defendant's son, and saw while my father was home alone with the two victims and he was in there, this defendant was in there, he was kneeling at [M.P.K's], this child's, bed, and his penis was sticking out of his shorts. You know, looking back on it, he was saying that I did notice that.

They got a buccal swab from this defendant, along with the victim, and mailed those off in August of 2005. It came back, of course, that it was this defendant's DNA in several places on the sheet and pillow.

In March of '06, Detective Watson re-interviewed Mr. Nelson. He told him about the DNA evidence. He said there wasn't any sexual contact with either victim and he couldn't explain why it was on the sheet. Detective Watson said well, if I take it to the grand jury and you're indicted, I'll call you and you can turn yourself in. But as the Court knows, and I think there was a hearing, Detective Watson was very professional and gave this defendant every chance to explain himself, and was very nice to him.

In the meantime, the defendant's wife was calling, too. He apparently told his wife that the DNA came back and cleared him, that the case was closed. So she called Detective Watson to see if that was true, and Detective Watson had to tell her, no, ma'am, it's not true. It pointed right at him.

And then in the later time, he was saying well, the semen must have got on there because I masturbated. His wife and daughter came in and said that could not be. We collected those sheets before he even had a chance to get in there, and what he is saying about later going in there and masturbating just doesn't fit the timeline, and they told him that. And they kept complaining, as Detective Watson testified earlier, you need to go ahead and arrest him, go ahead and arrest him. And he kept saying I'm going to wait until the grand jury. He's not running off, he has cooperated. He hasn't told the truth the whole time, but he has cooperated. I don't believe he's going to run off, and so I'm going to take it to the grand jury.

Like I say, that's the way it was left. I think once probably his wife found out that he had lied to her about the DNA, she started talking to him about it and then in May, as we said, he came in, our records would be unannounced. He brought his bag with him, wanted to go ahead and be arrested, and talked to Detective Watson. It's on tape. He advised him again.

This defendant described – How he said I didn't have intercourse with her. He said I didn't have sex with her, is the way he would say it. All I did was I put my penis in her mouth, and I did ejaculate in her mouth and some of it must have come out on those bed clothes. He also said this had been going on quite a while and had been several times. He couldn't state how may times that that had happened. And that little [M.P.K.], as far as the contact, it was true and that the DNA was his and it must have come out of her mouth as he put it in her mouth and ejaculated.

When asked by the trial court if the facts were true, the Defendant stated they were not but agreed that those would be facts the State would attempt to show at trial.

At the sentencing hearing, the following evidence was presented: Angela Kennedy, the victim's mother, testified that her daughter was four years old at the time of the incident in this case. The Defendant is Kennedy's uncle, and she allowed M.P.K. to stay with him for eight months while

she was attempting to get her life "back together." Kennedy stated that M.P.K., despite being eight years old at the time of the hearing, still had to wear "pull-ups"; M.P.K. was potty trained before this incident. Kennedy also stated that M.P.K. had anger problems that were manifested by her becoming very angry with her little sister. When asked why she gets angry, M.P.K will say she is thinking about what happened. M.P.K. has not been to counseling. Kennedy testified that she trusted the Defendant, and he violated that trust.

On cross-examination, Kennedy stated that she had insurance with which to obtain counseling but that they "talk to her at home about it." M.P.K. was in the third grade at the time of the sentencing hearing, making A's and B's. Kennedy admitted that one of the reasons that the Defendant pled guilty was to allow Kennedy and the victim to avoid the stress and turmoil of a trial.

Detective Watson testified that he investigated this case for two years. When asked whether the Defendant cooperated with the police, he responded that the Defendant only cooperated in the sense that the Defendant stayed away from the victim and her family. The Defendant, however, denied the allegations until the DNA results returned confirming the presence of the Defendant's DNA in M.P.K.'s bed. The Defendant did not threaten the victim or her family, and he came in to be interviewed every time Detective Watson asked. He also stated that the Defendant decided to plead guilty "to keep the victim from having to come to court to testify." The Defendant also told Detective Watson about his health problems, including having Lupus and taking medication that prevented him from having an erection.

On cross-examination, Detective Watson testified that the Defendant did not admit anything until the DNA test results returned. Additionally, Detective Watson described what the Defendant said at the suppression hearing: the Defendant testified that Detective Watson made him promises if he would confess. Detective Watson stated that this was not true.

The Defendant testified that he was fifty-one years old with Lupus, restless leg syndrome, ulcers, and heart problems. He pled guilty "[t]o keep the victim from having to come on the stand and relive the things . . . ." The Defendant requested the lightest sentence possible because of his health problems, and he claimed that this had never happened before.

On cross-examination, the Defendant admitted that he was convicted in 1994 of indecent exposure. The Defendant explained the circumstances surrounding that conviction:

> I was sitting in my mother's truck and the truck windows were all fogged up and a guy said that his girlfriend came into the store and told him that she saw me exposing myself, which wasn't true. And when I went to court with it, they said there was no use trying to refute it because the guy that accused me was a police officer.

The Defendant maintained that, even though he pled guilty, he was not guilty. The Defendant also maintained that he did not put his penis in the victim's mouth in this case; he only pled guilty to "keep the child from having to come in to testify." The Defendant admitted he confessed to that very

act, but he stated that Detective Watson made him promises to induce a confession. The Defendant denied admitting that "it happened several times," but stated that "I admitted to what she had accused me of." He told Detective Watson that the semen got on the bedsheets because "she was bad to drool,"[2] and, although he could not remember exactly how many times this occurred, it was "a few or several."[3] Although he denied touching her sexually, he admitted to "having her touch me." The Defendant stated that the child lived with him, and he, among others, had discipline over her.

Considering the evidence before it, the trial court determined that the Defendant was in a position of private trust, and he had a previous criminal conviction plus additional illegal conduct. The court noted that, although he pled guilty, the Defendant maintained the events did not happen. Based on these enhancement factors, and the limited weight applied to the catch-all mitigating factor, the trial court sentenced the Defendant to twenty-five years in confinement. It is from this judgment that the Defendant now appeals.

II. Analysis

On appeal, the Defendant only argues that the trial court erred in failing to properly consider the fact that the Defendant pled guilty in order to allow the victim to avoid trial.[4] He argues that the court should have considered the issue under the "catch-all" mitigating factor, *see* T.C.A. § 40-35-113(13) (2003), and sentenced him to fifteen years, the minimum for a Class A felony. *See* T.C.A. § 39-13-522(b) (2003) (rape of a child is a Class A felony); T.C.A. § 40-35-112(a)(1) (2003) (establishing the range as between fifteen and twenty five years).

At the time of sentencing, the presumptive sentence was twenty years, the midpoint in the range. T.C.A. § 40-35-210(c) (2003). If the trial court found enhancement factors, it was to enhance from the midpoint, and then mitigate if it also found mitigating factors. T.C.A. § 40-35-210(e). The trial court applied two enhancement factors: the defendant abused a position of private trust, and the defendant had a history of criminal convictions and criminal behavior. *See* T.C.A. § 40-35-114(2), (16) (2003).

When a defendant challenges the length, range or manner of service of a sentence, this Court

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[2]The following is a portion of the Defendant's confession:

> Well I would go into her room and, and have her perform oral sex on me. And evidently that's how that the ah, the ah, semen got on the bedsheets. Cause she was bad to drool and evidently it got on the bed sheets after one of the encounters. And you know when she was drooling so that's evidently how the, the DNA got there.

[3]The following is a portion of the Defendant's confession:

> And ah, so I don't remember the amount of times you know whether it was a few or, or several. Because I don't remember the dates and times but I do remember you know when the allegations were brought forth which was like you said on April 15th, of 2004.

[4]The Defendant also makes a passing reference to the fact that the State did not file any enhancement factors. This does not preclude the trial court from considering enhancement factors. *Graham v. State*, 90 S.W.3d 687, 692 (Tenn. 2002).

must conduct a de novo review on the record with a presumption that "the determinations made by the court from which the appeal is taken are correct." T.C.A. § 40-35-401(d) (2006). As the Sentencing Commission Comments to this section note, the burden is now on the appealing party to show that the sentencing is improper. T.C.A. § 40-35-401, Sentencing Comm'n Cmts. This means that if the trial court followed the statutory sentencing procedure, made findings of facts which are adequately supported in the record, and gave due consideration and proper weight to the factors and principles relevant to sentencing under the 1989 Sentencing Act, T.C.A. § 40-35-103 (2006), we may not disturb the sentence even if a different result was preferred. *State v. Ross*, 49 S.W.3d 833, 847 (Tenn. 2001). The presumption does not apply to the legal conclusions reached by the trial court in sentencing a defendant or to the determinations made by the trial court which are predicated upon uncontroverted facts. *State v. Dean*, 76 S.W.3d 352, 377 (Tenn. Crim. App. 2001); *State v. Butler*, 900 S.W.2d 305, 311 (Tenn. Crim. App. 1994); *State v. Smith*, 891 S.W.2d 922, 929 (Tenn. Crim. App. 1994).

In conducting a de novo review of a sentence, we must consider: (1) any evidence received at the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing, (4) the arguments of counsel relative to sentencing alternatives, (5) the nature and characteristics of the offense, (6) any mitigating or enhancement factors, (7) any statements made by the defendant on his or her own behalf and (8) the defendant's potential or lack of potential for rehabilitation or treatment. *See* T.C.A. § 40-35-210 (2006); *State v. Taylor*, 63 S.W.3d 400, 411 (Tenn. Crim. App. 2001).

Evidence presented at the sentencing hearing indicated that the Defendant was convicted in 1994 of indecent exposure, and he admitted to engaging in the type of conduct at issue a "few to several" times. Additionally, the Defendant was in a position of private trust because he was the victim's great-uncle, and the victim's mother placed the victim under his care and supervision. *See State v. Adams*, 864 S.W.2d 31, 34 (Tenn. 1993) (applying position of private trust enhancement factor to live-in boyfriend) *superceded, in part, by statute as recognized in State v. Jackson*, 60 S.W.3d 738, 741-42 (Tenn. 2001); *State v. Hayes*, 899 S.W.2d 175, 187 (Tenn. Crim. App. 1995) (father charged with care and control abused private trust).

Our review of the record further indicates that the trial court considered the Defendant's proposed mitigating factor. The court stated, "The Court does not find, as a matter of law, that there are any mitigating factors, other than the catchall provision for the Court to even consider." The court also stated, "based on everything else, the Court is going to sentence him to 25 years to serve at 100 percent." Although not specifically stated as such, it is clear from the record that the court considered this factor and placed no weight upon it.

The Defendant argues that his "candor and acceptance of responsibility" is an important factor and should be given "heavy consideration." *See State v. Daniel Norris*, No. 03C01-9803-CR-00111, 1999 WL 275295, at *3 (Tenn. Crim. App., at Knoxville, May 4, 1999) (addressing issues vis-á-vis denial of alternative sentence); *see also State v. Souder*, 105 S.W.3d 602, 607-08 (Tenn. Crim. App. 2002) (denying probation after failure to accept responsibility). As the trial court noted, the Defendant does not appear to accept responsibility. He claimed he was not

guilty, instead merely pleading guilty because he wanted to allow the victim and her family to avoid a trial.

In our view, the trial court followed the statutory sentencing procedure, made findings of facts which are adequately supported in the record, and gave due consideration and proper weight to the factors and principles relevant to sentencing under the 1989 Sentencing Act. As such, we may not disturb the sentence even if a different result was preferred. *State v. Ross*, 49 S.W.3d at 847. The Defendant is not entitled to relief on this issue.

III. Conclusion

Based on our review of the record, we conclude that the trial court did not err in giving no weight to the "catch-all" mitigating factor. The judgment of the trial court is affirmed.

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ROBERT W. WEDEMEYER, JUDGE